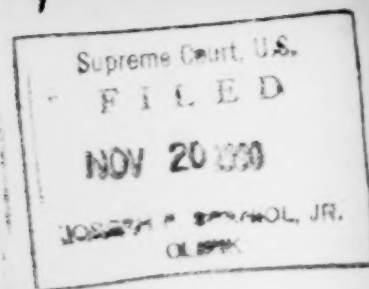


(3)
Petition No. 90-499
Cross-Petition No. 90-680



In The
Supreme Court of the United States

October Term, 1990

ACMAT CORPORATION,
Petitioner/Cross-Respondent,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
Respondent/Cross-Petitioner

**CROSS-RESPONDENT'S BRIEF IN RESPONSE
TO CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RAY GODDARD
675 Third Avenue
New York, New York 10017
(212) 949-0555
*Counsel of Record
and Attorney for
Petitioner/Cross-Respondent*

Joseph P. Dineen
Edward A. Stein
Goddard & Blum
Of Counsel

PRINTINGHOUSE PRESS
25 West 43rd Street New York, New York 10036 (212) 719-3120

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OPINIONS BELOW

The per curiam judgment order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the district court, is officially reported as *Acmat Corporation v.*

School District of Philadelphia, 904 F.2d 693 (3rd Cir. 1990) and appears in Appendix ("App.") A at 1a-2a.¹ The decision of the United States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in App. B at 3a-4a. The opinion and order of the United States District Court for the Eastern District of Pennsylvania, deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in App. C at 5a-24a. The district court's decision on Acmat's motion for reargument of the summary judgment motion was issued in open court, not officially reported, is printed in App. D at 51a-53a.

COUNTER-STATEMENT OF THE CASE

The Cross-Petition for a Writ of Certiorari highlights the importance of the issues raised in Acmat's Petition and emphasizes the need to grant both the Petition and Cross-Petition. The issue raised by the School District is whether the district court's order granting partial summary judgment, *sua sponte*, to Acmat² on a small number of claims, is contrary to state statutory law and the contract between the parties. Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, seeks review of the entire judgment, including the decision denying Acmat a full and fair hearing on all of its claims by dismissing the great majority of Acmat's claims on the School District's motion for summary judgment, determining, *sua sponte*, the amount of damages to be awarded Acmat on

¹ Appendices A through J are attached to Acmat's Petition for a Writ of Certiorari, bearing No. 90-499. Appendices K through M are attached to Acmat's Reply Brief. Appendix N is attached hereto.

² Acmat's corporate parent, subsidiaries and affiliates are: Amins, Inc. Geremia Electric Co., Acmat of Texas, Inc., Acstar Holdings, Inc., United Coasts Corp., Acstar Insurance Co. and United Coastal Insurance Co.

summary judgment on a small number of claims and the failure to give Acmat a full and fair hearing on its claim for contract retainage. Acmat's Petition does not challenge the finding of liability against the School District on those few items where entitlement was found.

A. Statement of Facts

In or about April and June 1984, Acmat and the School District entered into separate contracts for asbestos abatement in three school buildings in the City of Philadelphia. All of the contracts were duly approved by the Board of Education of the School District of Philadelphia ("School Board").

Almost from the start, Acmat encountered conditions that differed materially from those shown on the plans and specifications for the projects and differed from those it observed in pre-bid inspections. Moreover, the School District breached the contracts in many respects. The School District unreasonably interfered with construction by permitting the premises to flood, conducting improper and late inspections, issuing defective plans and specifications and ordering work that caused disruptions. Other breaches involved a dispute over the scope of work required by the contracts. The foregoing resulted in enormous delays and the loss of millions of dollars by Acmat.

The contract provisions provide a mechanism for compensating the contractor for work unilaterally ordered by the School District and for differing site conditions. Parenthetically, the provision dealing with compensation for differing site conditions received School Board approval with the initial approval of the contracts and there is no additional approval required under the agreements for compensation on account of such conditions. Other claims, including those for breach of contract, were to be redressed in accordance with the common law. Most of the disputed work

performed by Acmat was authorized in writing or was verbally approved. This was well documented in the record and was admitted by counsel for the School District. App. N at 1a-5a.

B. Prior Proceedings

This action was commenced in 1985 with the filing of a complaint in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity of citizenship. The complaint seeks damages for, *inter alia*, breach of contract, delays, differing site conditions and pleads a cause of action in quantum meruit.

In 1986 the district court directed Acmat to file a Statement of Claim. The School District filed a lengthy response acknowledging that additional work had been performed and assigning an amount therefor.

In 1988 the School District moved for summary judgment. Each of the parties was directed by the district court to file their statement with respect to those items of work authorized by the School District. The School District acknowledged that it authorized the performance of some work. The district court (Giles, J.) by order dated December 21, 1988, granted partial summary judgment to the School District. App. C at 5a-24a. The district court dismissed the claims for differing site conditions because of its erroneous determination that additional School Board approval was required for each such claim despite the School Board's initial approval of the contracts with a differing site condition clause by the School Board. Similarly, the claims for breach of contract were summarily dismissed on the grounds that there was no School Board approval for the additional labor and concomitant costs for work made more difficult and expensive by School District breaches.

The district court, *sua sponte*, found the School District liable to Acmat on a few claims because of the School District's acknowledgment of their validity. However, the district court, relying on certain contract language, restricted compensation for these claims primarily to that amount unilaterally determined by the School District, and further held that "... the claims for time and material costs are not subject to judicial review." App. C at 9a.

The School District's counterclaims and Acmat's sole remaining claim for contract retainages were tried to a jury and culminated in an Amended Final Judgment dated October 24, 1989. App. F at 97a-98a. However, after trial, but before the Amended Final Judgment was entered, the district court entertained argument and thereafter reduced the amount previously awarded Acmat because the School District's expert re-evaluated the amounts it would have allowed Acmat. App. G at 99a-128a.

Acmat's appeal and the School District's cross-appeal were argued before the United States Court of Appeals for the Third Circuit. A Per Curiam Judgment Order, without any discussion of the case, affirming the judgment of the District Court is dated May 23, 1990. *Acmat Corporation v. School District of Philadelphia*, 904F.2d 693 (3rd Cir. 1990). App. A at 1a-2a. Acmat's Petition for Rehearing was denied by decision dated June 22, 1990. App. B at 3a-4a.

Acmat's Petition for a Writ of Certiorari was docketed in this Court in September 1990, and bears No. 90-499.

I. THE CROSS-PETITION REINFORCES THE IMPORTANCE OF GRANTING CERTIORARI TO REVIEW THE JUDGMENT OF THE LOWER COURT

Acmat acknowledges the significance of the issues raised in the School District's Cross-Petition and submits that it substantiates the

importance of granting review to both Acmat and the School District. An analysis of the lower court's decision on the School District's motion for summary judgment shows an inconsistent approach to the issues. The district court, on the one hand, dismissed the major part of Acmat's claim on the incorrect conclusion that it was based solely on "extra work" that was not approved by the School Board and, on the other hand, granted partial summary judgment to Acmat on a small number of so-called "extra work" items that also did not receive School Board approval. Although the great majority of Acmat's claims were not based on "extra work" or were differing site condition claims whose compensation was already approved in the contracts, the district court deprived Acmat of showing this to be the case by dismissing most of its case on summary judgment.

Accordingly, both Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, and the School District's Cross-Petition should be granted to correct an illogical and inconsistent result that will have a far reaching negative effect on the construction industry. The School District takes the inconsistent position that it is entitled to certiorari, but that Acmat is not so entitled. The fact is that both parties seek certiorari because of the inconsistent decision of the district court that both granted and denied summary judgment on matters that were required to go to trial. The mere fact that the School District has sought certiorari lends support to Acmat's petition.

II. THE PARTIES SHOULD BE PERMITTED TO PROCEED TO TRIAL TO ADJUDICATE ACMAT'S CLAIMS

A. Acmat's claims do not involve "extra work" and are compensable without School Board approval.

Although the Petition and Cross-Petition show the importance of granting certiorari to review the judgment of the lower court,³ the School District erroneously suggests that reversal will result in dismissal of all of Acmat's claims. To the contrary, Acmat has demonstrated and will show if given the opportunity, that its claims are of the type that do not require School Board approval.

The district court even indicated at oral argument that it would have the power under *Derry Township School District v. Suburban Roofing Co., Inc.* 102 Pa. Commw. Ct. 54, 517 A.2d 225 (1986), to find the School District liable. Moreover, the Pennsylvania courts recognize that claims for differing site conditions [*Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964)], delay damages [*Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986)] and breach of contract [*Brinton v. School District of Shenango Township*, 81 Pa. Superior Ct. 450 (1923)], are separate and distinct from claims for extra work and are entitled to compensation even when claims for extra work are disallowed.⁴

³ Acmat seeks review of the entire judgment, including the adjudication of the School District's counterclaim.

⁴ Reliance by the School District on *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), is misplaced. The contract in *Durkin*, unlike the Acmat contracts, did not contain a differing site condition provision and its requirements for inspection were far more comprehensive than the inspection required of Acmat. Nor does *Durkin* have any bearing on Acmat's claims for breach of contract, delays and

Indeed, the School District acknowledged that much of the work that the district court awarded damages on would be compensable, except for its erroneous belief that School Board approval was required. See App. N at 1a-5a. Evidence of the School District's acknowledgment that additional work was performed can also be found in the School District's 1988 response to Acmat's Statement of Claim.

Accordingly, there is good and sufficient reason for this court to grant both the Petition and Cross-Petition in order to review the entire judgment of the lower court. Otherwise, the bad precedent set by this case shall have a deleterious impact on the entire construction industry doing business with the Commonwealth of Pennsylvania and its political subdivisions.

(fnt. 4 cont'd) quantum meruit recovery. In short, neither *Durkin* or the School Code has any application to the claims asserted by Acmat in the case at bar.

CONCLUSION

For these reasons, it is respectfully requested that the Petition and Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Ray Goddard
675 Third Avenue
New York, New York 10017
(212) 949-0555
*Counsel of Record and
Attorney for
Petitioner/Cross-Respondent
Acmat Corporation*

Joseph P. Dineen
Edward A. Stein
Goddard & Blum
Of Counsel

Dated: November 15, 1990

APPENDIX



1a

**APPENDIX N—EXCERPTS FROM TRANSCRIPT OF
ARGUMENT ON MOTIONS FOR SUMMARY
JUDGMENT ON OCTOBER 31, 1988**

In The

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT

Plaintiff,

vs.

**PHILADELPHIA SCHOOL DISTRICT,
et al.**

Defendant.

**Philadelphia, PA
October 31, 1988
9:05 a.m.**

CA No. 85-7067

**TRANSCRIPT OF HEARING BEFORE THE HONORABLE
JAMES T. GILES UNITED STATES DISTRICT JUDGE**

Appendix N

APPEARANCES:

For ACMAT: ANDREW B. COHN, ESQUIRE
GLENN F. ROSENBLUM, ESQUIRE
KORN, KLINE & KUTNER
1845 Walnut Street, 21st Floor
Philadelphia, PA 19106 19103

For Philadelphia School District: ANDRE L. DENNIS, ESQUIRE
STRADLEY, RONON, STEVENS & YOUNG
2600 One Commerce Square
Philadelphia, PA 19103-7098

For Marshall Marcus: ELLEN M. HOLTZMAN, ESQUIRE
2005 Market Street, Suite 3150
Philadelphia, PA 19103

For Hughes Urethane: JOHN M. HELEY, ESQUIRE
KARDOS, RICKLES, SELLERS & HELEY
626 South State Street
Newtown, PA 18940

(Proceedings recorded by electronic sound recording,
transcript produced by transcription service.)

* * *

MR. DENNIS: If the School Board responds in a formal way
to these claims, ACMAT's next intention is going to be that the
School Board or the School District is not the final arbiter. That in

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some way that response is unreasonable and we're going to be right back in Court again with respect to the value of those claims. Indeed, it will argue at that point that there has been ratification with respect to the work. The question now only amounts to how much should ACMAT receive.

THE COURT: Well, I'm not concerned about the School Board action which ostensibly approved part of the ACMAT claim and disapproved part of it. That's not my concern. My concern is, any category of work that the School District agreed or represented it was going to pass on to the School Board for approval as extra work, but didn't for some reason. With respect to the Rush School and the other school, where there were partial approvals — approvals are part of the plan. One can infer the School District considered the entire claim and determined that only 'x' amount fairly represented extra work.

But if the School District has failed to pass on to the School Board a proposed change order or extra work order, isn't there a dispute as to what action the School Board would take on that which the School District had promised the contractor it would pass on at least for post work ratification?

MR. DENNIS: Your Honor? First, with respect to the authorizations or promises. Some are in writing. Some are oral. With further respect to that, Your Honor, even though these two were passed on and processed — the \$18,000 and the \$63,000 proposals — ACMAT is still unsatisfied. If I may, Your Honor. Also there are some that do not even merit being passed on. For example, the overspray point. Your Honor properly pointed out that there is a question of whether that's within the contract.

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THE COURT: The School District never represented, did it, that the overspray was an extra item?

MR. DENNIS: Not to my knowledge, Your Honor.

THE COURT: Okay. So, I'm only talking about that which the School District, in writing, said to the contractor, this is extra work. It's to be treated as extra work for purposes of the basic contract. Okay? We're going to pass this on to the School Board for approval to do the formal documentation, but we're requesting you, Contractor, in the meantime to go on with the work. Rely upon us to get approval from the School Board. Okay? And then the School District fails to pass on to the School Board for its post work ratification this category of work. Now, ACMAT says that there is such and I'm not sure what the School District position is. Is there any work that falls into that category?

MR. DENNIS: Yes, there is, Your Honor.

THE COURT: Well, what's the reason for the School District never passing on to the School Board for its post work ratification that which it agreed to pass on?

MR. DENNIS: There were delays occasioned by insufficient documentation. There were delays occasioned by the lack of personnel to process the change orders. And then, we were in litigation. And once litigation happened, according to the School District, there was really no need to proceed with that process because ACMAT had asserted a civil claim.

THE COURT: Well, you filed a motion for summary judgment. You made these assertions as to why certain claims were not passed on to the School Board. Not claims, but the addenda,

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were not passed on to the School Board for approval of this school. And you rely on the *Deery* case for the proposition that the contractor had proceeded at his own risk.

MR. DENNIS: Yes, sir.

THE COURT: This Court might have the power, even under *Deery*, to require the School District to do what it would have undertaken to do and that is to submit to the School Board for approval or disapproval what the School District had said it was going to pass on. Do you follow me?

* * *